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Federal Communications Commission
Office of Secretary

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January 23, 1998

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Petition of Southwestern Bell Mobile Systems, Inc., for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments; File No 97-31, DA 97-2464

Dear Ms. Salas:

Please find enclosed the original and four (4) copies of the Reply Comments of Southwestern Bell Mobile Systems, Inc., in the above-captioned proceeding.

I have enclosed an additional copy of these Reply Comments to be file-stamped and returned to my legal assistant.

Please address questions and correspondence regarding this matter to me. Thank you.

Sincerely yours,

P Grant

Patrick J. Grant

Enclosures

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JAN 2 3 1998

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of SOUTHWESTERN BELL MOBILE SYSTEMS, INC. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments	)	File No. 97-31 DA 97-2464

TO: The Commission

REPLY COMMENTS OF
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

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January 23, 1998

SUMMARY

On November 12, 1997, SBMS filed a Petition requesting the Commission to declare that state-law based suits directly or indirectly challenging charges for incoming CMRS calls and charges for CMRS calls in whole-minute increments are barred by Section 332(c)(3) of the Communications Act. SBMS also requested the Commission to declare that such charges are not unjust or unreasonable under Section 201(b); to make certain declarations regarding the meanings of the terms "rates charged" and "call initiation" in the CMRS industry; and to declare that the Congress and the Commission have preferred competition over regulation in the wireless industry.

The Comments filed in response to the Commission's Public Notices overwhelmingly support the SBMS Petition. The only two commenters who oppose the Petition are the plaintiffs' class action attorneys in two of the many pending lawsuits throughout the country which give rise to the need for the declaratory ruling SBMS has requested.

For the reasons discussed below, the arguments of the class action lawyers -- particularly the arguments by one of the plaintiffs attempting to distinguish its claims from the types of claims barred by Section 332(c)(3) -- underscore the need for Commission action. Similarly, the comments of the lawyers regarding the "savings" clause and

the filed rate doctrine are incorrect. Accordingly, the SBMS Petition should be granted.

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TO: The Commission

REPLY COMMENTS OF
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Petitioner Southwestern Bell Mobile Systems, Inc. ("SBMS") files this Reply to the Comments which have been filed in this proceeding.

INTRODUCTION

On November 12, 1997, SBMS filed a Petition ("SBMS Petition") requesting the Commission to make several declarations regarding both charges for incoming CMRS calls and charges for CMRS calls in whole-minute increments. In particular, SBMS requested the Commission to declare that state-law based suits or claims directly or indirectly challenging such CMRS charges are barred by Section

332(c)(3) of the Communications Act. SBMS also asked the Commission to declare that charges for incoming calls and charges in whole-minute increments are not unjust or unreasonable under Section 201(b). SBMS further requested that the Commission rule on the meanings of the terms "rates charged" and "call initiation" in the CMRS industry, and requested a ruling regarding the federal government's preference for competition over regulation in the wireless industry. All of these requests can be granted on the record now before the Commission. In fact, of these requests, only Section 332(c)(3) preemption and the definition of "call initiation" are challenged in the comments submitted; thus, these are the only issues discussed in detail in these Reply Comments.

The comments filed in response to the Commission's Public Notices[1] overwhelmingly support the SBMS Petition. In fact, the only two commenters who oppose the Petition are plaintiffs' class action attorneys in current CMRS-related litigation which gave rise to the need for the SBMS Petition. For the reasons discussed below, the arguments

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[1] See Public Notices, In re Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, DA 97-2464, File No. 97-31 (released November 24, 1997) (inviting comments and reply comments) and (released December 22, 1997) (extending deadline for comments and reply comments).

in those comments are incorrect, and the SBMS Petition should be granted.[2]

ARGUMENT

A. Supporting Comments

As noted above, virtually all of the Comments -- except for those filed by the class action attorneys -- fully support the SBMS Petition.[3] In particular, these

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[2] On January 21, 1997, SBMS entered into a "Global Class Action Settlement Agreement" in a lawsuit pending in Illinois state court in which, among other claims, the plaintiffs asserted that inadequate disclosure of CMRS charges in whole-minute increments violates Section 201(b) of the Communications Act as an unjust practice. Penrod v. SBMS, No. 96-L-132 (Circuit Court, Third Judicial District, Madison County, Ill.). That day, the court entered an "Order Granting Preliminary Approval of Settlement" which, among other things, certified the class, for settlement purposes, as consisting of all wireless telephone (cellular or PCS) customers of SBMS and its affiliate, Southwestern Bell Wireless Inc. ("SBWI"), throughout the United States. It is not certain when or whether a final judgment will be entered in this case and, in any event, it would apply only to SBMS and SBWI, and not to other cellular or PCS carriers throughout the country which are defendants in other class action cases and whose interests are directly implicated by this Declaratory Ruling proceeding. Moreover, the Illinois case addresses charges in whole minute increments, and not the imposition of charges for incoming calls, which is an important issue in this proceeding. Thus, SBMS continues to urge that the Commission grant the SBMS Petition and issue the requested declaratory rulings.

[3] For example, AirTouch Communications "agrees wholeheartedly with the Petition." AirTouch Comments at 1. Ameritech "fully supports" the SBMS Petition. Ameritech Comments at 2. Century Cellunet also "fully agrees with SBMS." Century Cellunet Comments at 1.

Comments supplement and reinforce the factual and legal bases of the SBMS Petition on several grounds.

First, the scope of the problem is clear. It is beyond dispute that there is a large number of lawsuits pending against CMRS providers which challenge whole-minute charges and charges for incoming calls. Bell Atlantic Mobile ("BAM"), for example, notes that an "extraordinary number of [such] actions [have been] filed nationwide against cellular carriers" and further states that BAM itself "faces complaints which raise all of [SBMS's] same issues as well as other claims, in multiple jurisdictions."[4] Similarly, Comcast states that the "[CMRS] industry is currently inundated with class action lawsuits challenging virtually every aspect of wireless service," including "the rates charged for cellular airtime."[5] AT&T Wireless adds that, "like other carriers, [it] has been subjected to lawsuits under state and federal law challenging charging for incoming calls and billing in whole-minute increments."[6] As GTE notes, the per-minute cases in particular "typically allege fraud and breach of

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4 Bell Atlantic Mobile Comments at 2, 4.

5 Comcast Comments at iii.

6 AT&T Wireless Comments at 9. GTE notes that "[s]ince 1993, plaintiffs' attorneys have filed at least 20 class action suits in state court . . . seeking to recover damages against service providers charging for cellular service on a per-minute basis." GTE Comments at 2.

contract," although they "[i]n substance, . . . seek a retroactive cellular rate reduction."[7] These facts underscore the pressing need for the Commission to resolve the issues presented in this proceeding.[8]

Moreover, these commenters universally agree that charges for incoming CMRS calls and charges in whole-minute increments are long-standing and well-accepted. BellSouth, for example, notes that "charging in whole minute increments has . . . long been present and approved of in the CMRS and long distance industries" and that "[c]harging for incoming calls is also common in the CMRS industry and has been long accepted."[9] Nextel adds that consumers are well aware of these CMRS charges, noting that they "are very familiar to wireless telecommunications customers."[10] PrimeCo too observes that these charges "are well-known and long-standing within the wireless industry."[11] As AT&T

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7 GTE Comments at 2.

8 SBMS agrees with several commenters who argue specifically for a rapid resolution of this proceeding by the Commission. AirTouch, for example, urges that SBMS's requested ruling should be granted "as soon as possible." AirTouch Comments at 1, 5. AT&T Wireless argues for an "expeditious[]" ruling by the Commission. AT&T Wireless Comments at 9.

9 BellSouth Comments at 5-6.

10 Nextel Comments at 6-7.

11 PrimeCo Comments at 2. Sprint PCS adds that "[t]he one-minute increment . . . has been a standard time unit in telephony for many years." Sprint PCS Comments at 6.

states, the Commission recently stated that the "typical [CMRS] price structure" includes charges to the subscriber for air time use "regardless of whether the subscriber places or receives the call."[12]

The Comments also show that, although such charges are widespread in the CMRS industry, the competitive nature of the wireless marketplace has led to a wide variety of charging options for consumers.[13] For example, the Rural Telecommunications Group ("RTG") found that the billing increments offered by its members now varied among whole-minute increments, half-minute increments, per six-second increments, and flat fee plans.[14] RTG also noted that its members' competitors billed on both a per-minute and per-second basis.[15]

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[12] AT&T Wireless Comments at 8 (quoting Notice of Inquiry, In re Calling Party Pays Service Option in the Commercial Mobile Radio Services (WT Docket No. 97-207), FCC 97-341, ¶ 16 (released Oct. 23, 1997)).

[13] Nextel, for example, bills its customers in per-second increments, Nextel Comments at 3, and advertises that fact as differentiating its service from the customary whole-minute CMRS charges that customers expect.

[14] RTG Comments at 2. Some respondents were also in the process of converting to per-second billing. Id.

[15] RTG Comments at 2. With respect to the options available for charging for incoming calls, Nextel notes that "Sprint PCS and AT&T Digital PCS offer customers the first minute free on every incoming call." Nextel Comments at 3. PrimeCo adds that it "does not charge for the first minute of incoming calls." PrimeCo Comments at 10. AT&T Wireless, moreover, notes that
[Footnote continued on next page]

The use of such options has become a competitive tool. For example, Nextel notes that it "has differentiated its pricing plans from cellular and PCS by offering customers per-second rounding rather than per-minute rounding."[16] Omnipoint points out that "[c]harging in different increments of time is one way for a CMRS carrier to distinguish itself, which increases market competition."[17] If the states were to require per-second billing (or any other particular method of charging for calls), the pro-competitive -- and pro-consumer -- effect of having a variety of charging options would be lost. These comments are also unanimous in agreeing that state law regulation of such charges is preempted by Section 332(c)(3).

B. "Opposing" Comments

The comments of the plaintiffs' class action lawyers take issue with several of SBMS's legal and factual arguments. These comments, however, actually illustrate precisely why the kinds of lawsuits they have brought are preempted.

[Footnote continued from previous page]
carriers are experimenting with "calling party pays" plans. AT&T Wireless Comments at 8.

16 Nextel Comments at 3.

17 Omnipoint Comments at 4.

1. Smilow Comments

One of the opposing comments was filed by the law firm whose Massachusetts lawsuit, Smilow v. SBMS, was a catalyst for the SBMS Petition. Significantly, however, it should be noted that the Smilow Comments do not actually take issue with several of the declarations requested in the Petition, such as the inherent just and reasonable nature of the charges at issue. Rather, p[redacted]g th[redacted] scope of Section 332(c)(3), [redacted] The Smilow litigation is, nevertheless, a prime example of the type of suit which should be barred by Section 332(c)(3) and highlights why Commission action is necessary.

The Smilow Comments attempt to make a point of the fact that SBMS did not include the Smilow complaint with its Petition nor did SBMS discuss Smilow's particular contract in that filing.[18] As discussed above, however, there are scores of suits across the country which challenge CMRS per-minute charges and charges for incoming

18 See Smilow Comments at 1, 2, 8.

calls. Several of these suits target SBMS.[19] It is true that the order by Judge Keeton in the Smilow case -- in which he sought FCC involvement regarding the CMRS charges at issue in that case -- was a catalyst for the filing of the SBMS Petition at the Commission. However, SBMS did not seek to limit its Petition to that case, since the types of lawsuits SBMS addressed are widespread and the problems they create are general in nature. Nevertheless, since the Smilow Comments focus to such a great extent on the Smilow contract -- and theirs is one of only two comments opposing the SBMS Petition -- we will address the Smilow contract.

Specifically, the Smilow Comments argue that the contract at issue in the Smilow case expressly called for per-second billing (presumably with all seconds to be billed at the same rate) and expressly stated that incoming calls are free. Thus, Smilow's lawyers suggest that theirs is a simple breach of contract case in which the court can calculate damages by performing a simple arithmetic calculation whose application is beyond dispute.[20]

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[19] See note 3, supra.

[20] The Smilow Comments argue that the damages "would be the amount of money [SBMS] charged Smilow and the members of the class for [] overbilled time at the 'rates' in effect when those calls were made." Smilow Comments at 15. Smilow posits that the calculation of damages involves application of a simple equation which it states as "Price = Rate x Units of Service." Smilow Comments at 15. Smilow later adds that "[t]he rates are not at issue -- only the number of minutes for which
[Footnote continued on next page]

However, even a cursory review of the Smilow contract shows that it actually bears no resemblance to the contract Ms. Smilow's lawyers purport to describe in their comments. Specifically, nowhere does that contract say that calls will be billed in per-second increments -- much less that all seconds will be billed at the same rate. In the absence of any such provisions, the only way for the court to assess the damages sought in Smilow would be for it to select, from among a wide variety of possible billing options, a rate plan providing for per-second billing where each second is billed at the same rate. This would clearly engage the court in the regulation of CMRS rates in violation of Section 332(c)(3).

In [redacted] court, this rate [redacted]

Specifically, there is no reason to believe that if a CMRS provider were no longer allowed to bill on a per-minute basis it would necessarily both bill on a per-second basis and set the per-second rate at 1/60 of the former per-minute rate. While the first assumption is a possible result of a carrier being barred from charging in whole-minute increments (though it would be only one of many possible options the carrier might choose), the second

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[SBMS] can charge must be determined by the Court." Smilow Comments at 17.

assumption is almost certainly wrong. A rational carrier forced to change its charging structure from per-minute to per-second charges would not establish its new per-second charge simply by dividing its former per-minute charge by 60.

The Commission's staff has noted that such a choice would not allow the carrier to recover its costs: the carrier's revenue would decline while its operating expenses would remain the same.[21] As the Commission's analysis suggests, if forced by a court to bill on a per-second basis, the carrier would be forced by basic economics either to charge a higher rate per second than 1/60 of the former per-minute charge, institute an additional charge fully to recover its costs, or charge the initial seconds of a call at a higher rate than the subsequent seconds. Thus, Smilow's lawyers not only would have the courts engage in rate regulation, they would have them regulate CMRS rates in an irrational and retroactive way.

Simply put, the Smilow contract does not state that calls will be billed on a per-second basis; it does not set

[21] See Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq. (dated Dec. 2, 1993) (attached as Appendix A to the SBMS Petition) ("If per-second billing were required, interstate long-distance carriers would almost certainly react by setting their per-second rates at a level designed to recover the revenues that were generated by the previous rates.").

a per-second rate; and it does not preclude rounding.[22] For the court to say that billing must be on a per-second basis; that a particular per-second rate applies; and that there can be no rounding inevitably involves the court in rate regulation since it would be choosing a rate plan for the carrier.[23]

This is not to say that there is no role whatsoever for the courts in enforcing CMRS contracts. As SBMS stated in its Petition, a "state may regulate . . . whether the

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22 The Commission, as requested in the SBMS Petition, should clarify for the courts that even with contract terms like those Smilow points to, i.e., that chargeable time begins with "call initiation" and ends when call disconnect is confirmed -- billing in whole-minute increments [illegible] standard industry [illegible] and that customers expect to be billed in this manner. It should also clarify that such terms do not mean that calls will be billed on a per-second basis and has not been understood to mean that in the past. The Commission should make clear that since telephone calls have been billed on a rounded up, per-minute basis, it would be expected that if billing were to deviate from this charge, the agreement would state that call time would be calculated on a per-second basis and a per-second rate would be set out. For cellular customers in Massachusetts, this expectation was likely reinforced by the [illegible] years, SBMS's tariff filed with the Massachusetts Department of Public Utilities provided for [illegible] for incoming calls and charging in whole-minute increments.

23 As requested in the SBMS Petition, the Commission should declare that "rates charged," for purposes of Section 332(c)(3) clearly means, at a minimum, a carrier's determination of what it will charge for and how much it will charge for it. Smilow wants those decisions governed by state law, while Congress has determined that the states and state courts cannot do so.

correct CMRS rate was applied."[24] Thus, if a CMRS carrier charged rates at variance with the clearly enunciated and agreed-upon rate -- for example, the customer was charged 50¢ per minute while the rate for calls was to be billed at 25¢ per minute -- it might be appropriate (depending on other circumstances of the case) for a court to find a breach of contract and award damages. Similarly, if the Smilow contract and customer service materials stated that SBMS would bill its customers on a per-second basis, and that each second would be billed at the same rate, and established a per-second rate -- and yet SBMS still billed its customers on a rounded-up, per-minute basis -- judicial action might be warranted, and not in conflict with Section 332(c)(3).

The Commission should urge the courts, however, carefully to scrutinize such claims to ensure that no CMRS rate-regulation would be involved in their rulings. This position is supported, for example, in the comments of Comcast which has requested the Commission to "instruct all courts to carefully scrutinize claims pleaded in terms of 'nondisclosure'" to see if their central thrust is an attack on "federally preempted rates or practices."[25]

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[24] SBMS Petition at 14 n.26.

[25] Comcast Comments at 24, 26 (emphasis removed).

Moreover, the Commission should stress that courts, in reviewing a CMRS contract to ensure that a case raises only a simple breach of contract claim whose resolution would not involve the court in rate regulation, should keep in mind the well-established and reasonable nature of charging in whole-minute increments and charging for incoming calls, and should be reluctant to construe contracts as departing from these charges unless they clearly do so.

Indeed, the Smilow court indicated that the Commission's views on these specific subjects would be relevant to its interpretation of the contract in that case. The Smilow court said:

> [I]t is at the least a reasonable hypothesis and perhaps a probability . . . that some aspects of this dispute can be resolved on grounds of national communications policy and practice within the area as to which the FCC has special competence. Contracts between parties are to some extent subject to overriding national policy manifested in legislation and decisions of an administrative agency authorized by Act of Congress to act in a specialized field. It is doubtful indeed that this dispute can be resolved simply on the basis of the contract law of one or another or more than one of the various states.[26]

[26] Memorandum and Order, Smilow v. SBMS, Civ. A. No. 97-10307-REK, at 8 (D. Mass. July 11, 1997) (emphasis added).

Other courts should be urged to do so as well.

Finally, contrary to the suggestion in the Smilow Comments, the Commission should clarify that "call initiation" in the CMRS industry is understood to mean both the placing of outgoing calls and the acceptance of incoming calls by a cellular subscriber.[27] The Smilow Comments dismiss this definition as "sophistry" and "contrary to the [term's] plain meaning."[28] Notably, however, Smilow makes no reasoned argument against SBMS's position, and statements throughout the various other comments support this interpretation of "call initiation"[29] and demonstrate that that term is, in fact, commonly understood to have the meaning SBMS and others have described. The Smilow court indicated that an interpretation of the "call initiation" term might be essential to a resolution of the Smilow dispute and that the Commission, with its particularized experience and expertise, might be in a better position to set out the term's definition.[30] Thus, it is particularly appropriate

27 See also SBMS Petition at 11-12.

28 Smilow Comments at 10 n.8.

29 See, e.g., Liberty Cellular, Inc. and North Carolina RSA 3 Cellular Telephone Company Comments at 4-5; Cellular Telecommunications Industry Association Comments at 12.

30 As the court said: "In deciding whether Chargeable Time should include calls not initiated by the mobile
[Footnote continued on next page]

for the Commission to grant the declaration requested by SBMS and clarify that the term "call initiation" is employed in CMRS contracts to describe the action taken by a CMRS user to activate and terminate connection to the cellular network by pressing the "SEND" and "END" buttons, whether that action accepts an incoming call or places an outgoing call.

2. Savings Clause.

Both the Smilow Comments and the McKay/Sommerman Comments (the Comments of the other plaintiffs' class action attorneys) argue that the Communications Act's "savings clause" preserves their state-law-based claims, notwithstanding Section 332(c)(3).[31] This attempted reliance on the savings clause is misplaced.

[Footnote continued from previous page]
service user under the terms of the Contract, or methods of calculating the Chargeable Time for cellular phone calls under the Contract, a decisionmaker (whether the FCC, a court, or a court and jury) may have to evaluate technical and policy considerations relating to cellular phone service. The FCC . . . may be better qualified to make some of the evaluative choices that full resolution of this dispute will require. It is at least a likely possibility, then, that the FCC is a more appropriate initial decisionmaker than a United States district court." Memorandum and Order, Smilow v. SBMS, Civ. A. No. 97-10307-REK, at 8-9 (D. Mass. July 11, 1997) (emphasis added to sentence).

[31] Smilow Comments at 11; McKay/Sommerman Comments at 5-7.

Although Section 414 of the Act preserves certain state law actions in certain situations, the courts have been virtually unanimous in holding that the actions preserved must not conflict with the provisions of the Act.[32] For example, as one federal district court stated, the savings clause preserves only those "[s]tate-law remedies which do not interfere with the Federal Government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the [Communications] Act."[33] In the Smilow case and those like it, however, the state law claims conflict with the express preemption provision of Section 332(c)(3). In fact, one court has already been faced with the savings clause argument Smilow puts forth and has recognized that Section 332(c)(3) preemption governs, notwithstanding the savings clause. The court said that "the savings clause cannot plausibly be read to preserve state law claims which directly conflict with the preemption of state regulation of CMRS rates envisioned by Section 332 of the Act."[34] In effect, the reading Smilow

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32 Notably, none of the cases Smilow or McKay/Sommerman cite in support of their savings clause arguments deal with Section 332(c)(3) -- or, in fact, any preemptive provision of the Act.

33 MCI Telecomm. Corp. v. Graphnet, Inc., 881 F. Supp. 126, 131 (D.N.J. 1995).

34 In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1205 (E.D. Pa. 1996).

and McKay/Sommerman suggest would lead to the impermissible result of allowing "[a] general remedies savings clause . . . to supersede [a] specific substantive pre-emption provision."[35] Moreover, it is paradoxical at best to argue that what Section 332(c)(3) specifically takes away, Section 414, enacted 50 years earlier, gives back. The Commission should reject the Smilow and McKay/Sommerman savings clause arguments.

3. Filed Rate Doctrine

The Smilow Comments attempt to refute SBMS's argument -- that the types of damage awards at issue in the SBMS Petition amount to CMRS rate regulation -- by asserting that several cases SBMS cites in its Petition "are distinguishable from the facts in the Smilow Action

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35 Carstensen v. Brunswick Corp., 49 F.3d 430, 432 (8th Cir. 1995) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992)), cert. denied, 116 S. Ct. 182 (1995).

The [illegible] the McKay/Sommerman Comments regarding [illegible], see McKay/Sommerman Co[illegible] are utterly inapposite. "Co[illegible] refers to the conversion of a sta[illegible] into a federal claim for the purposes of removal jurisdiction and the well-pleaded complaint rule. See, e.g., State of Vermont v. Oncor Communications, Inc., 166 F.R.D. 313, 318 (D. Vt. 1996). This argument is not put forth by SBMS in its petition and is not one pursued here. SBMS argues, rather, that Section 332(c)(3) specifically preempts the actions brought here, a completely separate argument. See, e.g, Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 171 (3d Cir. 1997); Giddens v. Hometown Financial Servs., 938 F. Supp. 801, 805 (M.D. Ala. 1996).

because in those . . . cases, the court found that plaintiffs' claims were barred by the 'filed rate doctrine,'" and CMRS providers are not required to file tariffs.[36] This argument, however, completely misreads SBMS's references to the filed rate doctrine cases and also misreads the relevant caselaw.

In its Petition, SBMS did not argue that the filed rate doctrine applies to CMRS providers. Instead, SBMS cited the filed rate doctrine cases because they establish that courts will hold that damage awards in cases such as Smilow's purported breach of contract action do effect a change in -- and regulation of -- rates. In the filed rate doctrine cases SBMS cited, the courts held that they could not award damages because the filed rate doctrine barred the courts from effecting a change in certain telephone rates and the damage awards sought effected just such a change in rates. These cases thus show that damage awards in cases like Smilow would also be considered to effect a change in rates; similarly, they would therefore be barred by Section 332(c)(3) -- not the filed rate doctrine -- as an impermissible change in -- and regulation of -- CMRS rates. The precedents SBMS cited show that the courts are precluded from acting on Smilow-like claims. Thus, the

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36 Smilow Comments at 13.

Commission should reject the filed rate doctrine argument set forth in the Smilow Comments.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the SBMS Petition and the supporting Comments, the Commission should grant all aspect of SBMS's Petition for Declaratory Ruling.

Respectfully submitted,

Carol L. Tacker (KJ)

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January 23, 1998

CERTIFICATE OF SERVICE

I, Barry Kreiswirth, hereby certify that on this 23rd day of January 1998, a copy of the foregoing Reply Comments of Southwestern Bell Mobile Systems, Inc., has been served by first-class mail, postage prepaid (or, in the cases of those persons whose names are preceded by an asterisk, by hand delivery), to the following persons:

* The Honorable William E. Kennard
Chairman
Federal Communications Commission
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Washington, D.C. 20554

* The Honorable Susan Ness
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MESSAGE: Re: FCC File No. 97-31; DA No. 97-2464

As you requested, please find attached a copy of the July 11, 1997 Memorandum and Order by Judge Keeton in the Smilow v. SBMS case.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JILL ANN SMILOW, On Her Behalf And On Behalf Of All Others Similarly Situated, Plaintiff, v. SOUTHWESTERN BELL MOBILE SYSTEMS, INC., Doing Business As Cellular One, Defendant.	CIVIL ACTION NO. 97-10307-REK

Memorandum and Order
July 11, 1997

I. Pending Motions

Pending before this court is a motion by the defendant to dismiss or stay plaintiff's proposed class action complaint under Fed.R.Civ.P. 12(b)(6), and to refer the matter to the Federal Communications Commission for resolution.

II. Background

Plaintiff brought this proposed class action against defendant, Southwestern Bell Mobile Systems, Inc. ("Cellular One"), to recover damages under 47 U.S.C. §§201, 206, and 207 ("the Communications Act"), Massachusetts General Laws, Chapter 93A, §2(a), and the common law. Compl. ¶ 3.

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Cellular One is in the business of selling cellular services. Plaintiff entered into a contract for cellular telephone service with the defendant on December 31, 1995. Compl. ¶ 6. Paragraph 13 of the Terms and Conditions of the Contract between the plaintiff and the defendant states:

> Chargeable time for calls originated by a Mobile Subscriber Unit starts when the Mobile Subscriber Unit signals call initiation to C1's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to C1's facilities and the call disconnect signal has been confirmed. Chargeable time may include time for the cellular system to recognize that only one party has disconnected from the call, and may also include time to clear the channels in use.

Compl. Exhibit One.

Plaintiff alleges that defendant overcharges for its cellular phone service in two ways. First, plaintiff asserts that defendant, in violation of the contract between the parties, charges for incoming as well as outgoing calls to plaintiff's cellular phone. Plaintiff notes that no provision in the contract allows the defendant to charge the plaintiff for time in connection with calls received by the plaintiff's cellular phone. ("Chargeable Time . . . starts when Mobile Subscriber Unit **signals call initiation** to C1") (emphasis added). Second, plaintiff alleges that defendant, in violation of the contract between the parties, rounds up the Chargeable Time to the next whole minute. ("Chargeable Time . . . ends when the Mobile Subscriber Unit signals call disconnect to C1's facilities"). Hence, all calls with Chargeable Time ending from one second to fifty-nine seconds are rounded up to the next whole minute. Plaintiff contends that neither Paragraph 13 nor any other provision of the Contract allows for the addition of seconds to the Chargeable Time in order to round the Chargeable Time to the next whole minute.

The Complaint contains three counts. Count I, breach of contract, asserts that defendant had a contractual duty to charge plaintiff only for time defined as Chargeable Time by paragraph 13 of the Contract, and therefore defendant broke the contract between the parties by both charging for calls not initiated by the plaintiff and charging for the extra time as a result of defendant's practice of rounding up the Chargeable Time to the next whole minute.

Count II, violation of 47 U.S.C. §201(b), states that defendant's conduct constitutes "unjust" practices. Section 201(b) states in relevant part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful:

47 U.S.C. §201(b).

Plaintiff's only claim that the defendant has violated §201(b) is that the defendant's practices of charging for incoming calls and rounding up each call's Chargeable Time to the next whole minute are "unjust" practices because they are not permitted by, are in conflict with, and are a breach of, the Contract.

Count III, violation of M.G.L. Ch. 93A, §2(a), alleges that the defendant's conduct constitutes willful and knowing unfair and deceptive trade practices. Section 2(a) states:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> M.G.L. 93A, §2(a).

Plaintiff claims that defendant's practices of charging for incoming calls and rounding up each call's Chargeable Time to the next whole minute are "unfair" and "deceptive" acts or practices because they are not permitted by, are in conflict with, and are a breach of, the Contract.

III. Class Action Allegations

Plaintiff designates its original filing as a "Class Action Complaint." This designation, however, is not effective to give this civil action the status of a "class action" under Fed.R.Civ.P. 23(a), 23(b)(2) and 23(b)(3). Rule 23(c)(1) requires that before a class is formed, the court shall determine by order whether a civil action is to be so maintained.

Up to the present time, no motion has been filed by any party seeking a court order of class certification. The court will not make such a determination without a showing of record that the prerequisites for a class action have been met.

IV. Motion to Dismiss or Stay under Fed.R.Civ.P. 12(b)(6)

Defendant has moved for dismissal or stay of proceedings in this civil action under Fed.R.Civ.P. 12(b)(6), and in the motion requests that this court refer the matter to the Federal Communications Commission ("FCC") for decision. The stated grounds for the motion are that, under the doctrine of primary jurisdiction, this court should defer adjudication of the issues raised in plaintiff's complaint pending initial determination by the FCC.

No showing has been made, in support of the request that this court "refer" the matter to the FCC, that this court has been granted authority to order the FCC to take a matter for decision. In these circumstances, this court will do no more than direct the Clerk of this court to send to the FCC an informational copy of this Memorandum and Order.

The issue presented is not, strictly speaking, one of jurisdiction. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, n.1 (1st Cir. 1979). Regardless, however, of the choice of label, among "doctrine of primary jurisdiction," "doctrine of deference," or some other term or phrase, I conclude that I must consider whether the most appropriate course of action for this court is to make an order that defers decision on the merits by this court until the dispute has come to the attention of the FCC and it has had an opportunity to resolve the dispute.

Rule 12(b) allows a defendant to assert a defense or objection, in law or fact, to a claim for relief in any pleading. A motion under Rule 12(b)(6) is the proper vehicle for presenting a defendant's contention that the plaintiff has failed to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Defendant's memorandum of law in this case, however, does not assert that the plaintiff has not alleged a claim upon which relief can be granted. Rather defendant's memorandum asserts that plaintiff's complaint should be dismissed because this court should apply what the defendant characterizes as the doctrine of primary jurisdiction and allow the FCC to adjudicate the policy issues raised by plaintiff. Because a motion under Rule 12(b)(6) is not a proper vehicle for such a contention, the court, in the Order attached to this Memorandum, denies the defendant's motion.

Anticipating that the defendant will wish to present this contention in an appropriate way and may do so by motion under Rule 7(b)(1) or in some other way, the remainder of this Memorandum, in the interest of expediting proceedings, calls to the attention of the parties the concerns of the court that bear upon what action the court should take in this case.

V. Discussion

Precedents bearing on primary jurisdiction, deferential stay, abstention, or dismissal are responsive to the public interest in coordinating judicial and administrative processes. See Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68 (1956); United States v. Western Pacific Railroad Company, 352 U.S. 59, 63 (1956); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580 (1st Cir.

1979). Unlike precedents responsive to interests in "exhaustion" of administrative remedies before resort to court, which interests have led courts not to accept disputes for decision before the parties have sought resolution before the appropriate administrative agency, the precedents invoked by the defendant in this case apply when the prerequisites of jurisdiction of the court have been satisfied but good cause exists for stay or abstention on the ground that the dispute involves issues that may more appropriately be resolved by an administrative agency that has been created by Act of Congress with delegated authority relevant to a specialized kind of dispute. See Western Pacific Railroad Company, 352 U.S. at 64. Thus, the relevant interests to be weighed include those of harmony, efficiency, and administrative expertness. See Mashpee Tribe, 592 F.2d at 580; Far East Conference v. United States, 342 U.S. 570, 574 (1952). "No fixed formula exists for applying the doctrine of primary jurisdiction." Western Pacific Railroad Company, 352 U.S. at 64. Decisions are to be made on prudential, rather than legally defined bright-line categorical, grounds.

The First Circuit has identified three principal factors that a court should consider in determining whether to invoke this body of precedent: "(1) whether the agency determination [lies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [is] required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." New

England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157, 172 (1st Cir. 1989) (citing Mashpee Tribe, 592 F.2d at 580-581). With respect to whether this court should invoke these precedents in this case, it is at the least a reasonable hypothesis and perhaps a probability, on the basis of the limited record now before this court, that some aspects of this dispute can be resolved on grounds of national communications policy and practice within the area as to which the FCC has special competence. Contracts between parties are to some extent subject to overriding national policy manifested in legislation and decisions of an administrative agency authorized by Act of Congress to act in a specialized field. It is doubtful indeed that this dispute can be resolved simply on the basis of the contract law of one or another or more than one of the various states.

The primary dispute between the parties in this case is over the concept of Chargeable Time as defined in the Contract. In deciding whether Chargeable Time should include calls not initiated by the mobile service user under the terms of the Contract, or methods of calculating the Chargeable Time for cellular phone calls under the Contract, a decisionmaker (whether the FCC, a court, or a court and jury) may have to evaluate technical and policy considerations relating to cellular phone service. The FCC, even if not required to accept jurisdiction and decide the dispute, may be better qualified to make some of the evaluative choices that full resolution of this dispute will require. It is at least a likely possibility, then, that the FCC is a more appropriate initial decisionmaker than a United States district court.

Weighing on the other side of a full calculus is the potential for extended delay. See e.g., Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 321 (a court must weigh the advantages of awaiting administrative agency decision against the potential costs resulting from complications and delay in administrative proceedings); Mashpee Tribe, 592 F.2d at 581 (the district court was right to respect the strong public interest in the prompt resolution of the case and not defer to administrative action of uncertain aid and uncertain speed).

After the FCC has had a reasonable opportunity to rule, this court will revisit the matter. The Clerk is ordered to submit a copy of this Memorandum and Order to the FCC as notice of this court's proceedings.

The parties are directed to be prepared to advise the court of their respective positions about whether any party proposes to initiate proceedings before the FCC, and whether this case should proceed in this court without any stay.

VI. Order

For the foregoing reasons, it is ORDERED:

(1) Defendant's motion to dismiss under Fed.R.Civ.P. 12(b)(6) is DENIED.

(2) As a courtesy to the Federal Communications Commission and to inform it of the pendency of this Civil Action in

this court, the Clerk is directed to send a certified copy of this Memorandum and Order to the Federal Communications Commission.

(3) The parties are directed to be prepared to present their respective positions on matters discussed in the foregoing Memorandum at the conference scheduled for July 22, 1997 at 4:00 p.m.

Robert E Keeton

United States District Judge